



on May 6, 2005, stating it recognized that IGWA had complied with the Director's Amended Order within a limited amount of time, but that the Conjunctive Management Rules only authorize replacement water plans within the context of a mitigation plan. As a consequence, Reclamation stated that while it reserved its right to challenge the factual and legal basis of the water amount the Director determined was appropriate for IGWA and others to provide, it would not oppose the implementation of the 27,700 acre feet for the 2005 season only. Further, Reclamation stated that any determination of replacement water supplies needs to be addressed through a hearing on IGWA's mitigation plan as provided by the Department's Conjunctive Management Rules.

IGWA submitted its mitigation plan on February 8, 2005, and Reclamation protested it on March 21, 2005. In response to IGWA's Motion for a Continuance of the Hearing on the Mitigation Plan, the Director granted a continuance on March 18, 2005.

On May 6, 2005, the Director approved IGWA's Replacement Plan for one-year, provided IGWA submitted additional information to support that 27,700 acre feet has been secured. *Order of Regarding IGWA Replacement Water Plan* (May 6, 2005).

## **ARGUMENT**

### **A. A REPLACEMENT WATER PLAN IS A MITIGATION PLAN AND MUST BE PROCESSED AS ONE BY IDWR UNDER IDAPA 37.03.11.43**

As suggested by IGWA, the Director has broad discretion to interpret IDWR's Conjunctive Management Rules. This discretion however does not extend to creating a new remedy called a "Replacement Plan" that actually circumvents the process provided for by Conjunctive Management Rule 37.03.11.043. *See* I.C. § 67-5279(3)(c) (Court may void an agency action if it is made upon unlawful procedure).

The Department's Conjunctive Management Rules describe a plan providing

replacement water as a “mitigation plan” when:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 ... identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

*See* IDAPA 37.03.11.010.15 (definition of “mitigation plan”). Thus, if the replacement water plan is truly a “mitigation plan,” then the Conjunctive Management Rules prescribe a process and standards for evaluation of such a plan. *See* IDAPA 37.03.11.043(01)-(03)(Mitigation Plans are to be submitted to the Director and contain identifying information, upon receipt the Director will provide notice and hold a hearing under authority of I.C. § 42-222, and consider 15 factors to determine whether a mitigation plan will prevent injury to senior water rights).

In our case, the Director has approved a document submitted by IGWA for the benefit of junior ground water rights. This document identifies actions and measures to prevent injury to senior water rights for material injury caused by the diversion of junior ground water rights within an area having a common ground water supply. *See Order Regarding IGWA Replacement Water Plan* (May 6, 2005).

It is an unlawful for the Director to order a mitigation plan, yet call it a replacement plan. It is an abuse of discretion for the Director to accept a replacement plan with no standards or process by which either he or the other parties can evaluate the plan. These kinds of agency decisions are unsupported by substantial evidence. *See Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982)(agency must have sufficient findings of fact and conclusions of law in order to determine whether its decision was arbitrary and capricious or clearly erroneous under Idaho’s Administrative Procedures Act). *See Sanders Orchard v.*

*Gem County*, 137 Idaho 695, 52 P.3d 840 (2002)(county's findings were not supported by substantial evidence when neither written nor oral evidence was presented on the issue).

Moreover, the Director will violate the Idaho Constitution if minimum due process requirements are not satisfied in a contested case proceeding. *See Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 8 P.3d 646, 649 (Idaho 2000)(fundamental element of procedural due process is the right to present and rebut evidence in defense of protected property interests); *Gay v. County Commissioners*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982)(an administrative record is indispensable to assure adequate opportunity to present or to rebut evidence).

**B. A PROTEST IS THE APPROPRIATE MEANS TO  
CHALLENGE A REPLACEMENT PLAN THAT IS  
ACTUALLY A MITIGATION PLAN**

IGWA argues that it is only responding to a mandatory directive by the Director in submitting its Replacement Plan. *See IGWA Response to Objections to Plan for Providing Replacement Water* at 4. IGWA also asserts "this is not a proceeding where a mitigation plan is being proposed or heard." *Id.* at 4. Reclamation acknowledges that IGWA is responding to an order from the Director, but it is disingenuous of IGWA to assert that it is not a claim of right since IGWA could choose to curtail junior rights in lieu of providing the replacement water.

The underlying issue, however, is not whether IGWA is responding voluntarily, but whether the Director had authority to require IGWA and other ground water users to submit a replacement plan in the first place. Reclamation submits that he did not. The replacement plans are actually mitigation plans in disguise. Furthermore, there is a process in place for evaluating the adequacy of mitigation plans, *see* IDAPA 37.03.11.43.03(a)-(o), while none

exists for replacement plans. The Director's treatment of IGWA's document as a replacement plan effectively bypasses the mitigation plan procedure.

IGWA is also correct that a hearing on the Amended Order will only address: (1) the basis for the amount of water the Director required the ground water users to "replace," and (2) whether the Director's determination has a solid legal and factual basis. In addition, a hearing on the Amended Order cannot address the adequacy of the replacement plan itself. The Director must hold separate hearing(s) on the replacement water plans. *See* I.C. § 67-5248(2) ("Findings of fact must be based exclusively on the evidence in the record of a contested case and on matters officially noticed in that proceeding"). The Director must also apply standards to determine the adequacy of the replacement plan, and evaluate whether the replacement water actually "mitigates" the injury to senior water rights. To do otherwise will not provide a basis for a court to determine that the Director's determinations are based upon "substantial evidence" in the record. *See Howard v. Canyon County Board of Commissioners*, 138 Idaho 479, 915 P.2d 709 (1996) (Supreme Court review limited to determining if decision is supported by substantial and competent evidence); and *see Price v. Payette County Board of County Commissioners*, 131 Idaho 426, 430, 958 P.2d 583, 587 (1998) (only after the Board of County Commissioners follow the correct zoning procedures can the Board consider the request to amend the zoning ordinance).

Since the Conjunctive Management Rules provide a process for evaluating mitigation plans, the Director should have initiated a hearing process to determine if the plans are adequate and meet the statutory provisions of I.C. § 42-222. *See* IDAPA 37.03.11.043.02. Regardless of whether the Director acted correctly or not in initiating a hearing, Reclamation's

protest to the replacement plan is an appropriate means for it to protect its legal interests since it opposes the claim of right of IGWA to file a mitigation/replacement plan.


Reclamation proposes that the Director and the parties should avoid duplicating efforts to assess the adequacy of IGWA's submitted mitigation and replacement plans by holding a consolidated contested case hearing for both administrative expediency and to ensure sufficient due process to the parties.

### CONCLUSION

For the foregoing reasons, Reclamation's protest to IGWA's replacement plan should be granted, and a hearing held to ensure the adequacy of the mitigation submitted.

Dated this 7 day of June, 2005.

U.S. Department of the Interior, Bureau of Reclamation

By   
KATHLEEN MARION CARR

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 1st day of June 2005, a true and correct copy of **RECLAMATION'S REPLY TO IDAHO GROUND WATER APPROPRIATORS' RESPONSE TO OBJECTIONS TO PLAN FOR PROVIDING REPLACEMENT WATER** was served on the following person(s) as shown below:

**Director, Karl J. Dreher**  
**Idaho Department of Water Resources**  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098  
By Hand Carry

**John K. Simpson**  
**Barker Rosholt & Simpson, LLP**  
P. O. Box 2139  
Boise, ID 83701-2139  
By U.S. Mail

**Roger Ling**  
**Ling Robinson & Walker**  
P. O. Box 396  
Rupert, ID 83350  
By U.S. Mail

**C. Thomas Arkoosh**  
**Arkoosh Law Office, Chtd.**  
P. O. Box 32  
Gooding, ID 83330-0032  
By U.S. Mail

**W. Kent Fletcher**  
**Fletcher Law Office**  
P. O. Box 248  
Burley, ID 83318  
By U.S. Mail

**Travis L. Thompson**  
**Barker Rosholt & Simpson, LLP**  
113 Main Avenue West, Suite 303  
Twin Falls, ID 83301-6167  
By U.S. Mail

**Jeffrey C. Fereday**  
**Michael C. Creamer**  
**Givens Pursley, LLP**  
P. O. Box 2720  
Boise, ID 83701  
By U.S. Mail

**James Tucker**  
**Idaho Power Company**  
1221 W. Idaho St.  
Boise ID 83702  
By U.S. Mail

**James S. Lochhead**  
**Adam T. DeVoe**  
**Brownstein Hyatt & Farber, P.C.**  
410 17<sup>th</sup> St., 22<sup>nd</sup> Floor  
Denver, CO 80202  
By U.S. Mail

**Scott L. Campbell**  
**Moffatt Thomas Barrett Rock & Fields, Chtd**  
P. O. Box 829  
Boise, ID 83701  
By U.S. Mail

**Josephine P. Beeman**  
**Beeman & Associates, P.C.**  
409 West Jefferson Street  
Boise, ID 83702  
By U.S. Mail

**Sarah A. Klahn**  
**WHITE & JANKOWSKI, LLP**  
511 16<sup>TH</sup> Street, Suite 500  
Denver, CO 80202  
By U.S. Mail

**Michael S. Gilmore**  
**Deputy Attorney General, State of**  
**Idaho**  
Statehouse, Room 210  
Boise, ID 83720  
By U.S. Mail

**U.S. Bureau of Reclamation**  
**E. Gail McGarry, PN-3100**  
1150 N. Curtis Road  
Boise, ID 83706-1234  
By U.S. Mail

**Idaho Department of Water Resources**  
**Southern Region Office**  
1341 Fillmore St., Ste. 200  
Twin Falls, ID 83301-3033  
By U.S. Mail

**Terry T. Uhling**  
**Gray Young**  
**J.R. Simplot**  
999 Main Street  
Boise, ID 83702  
By U.S. Mail

**Idaho Department of Water Resources**  
**Eastern Region Office**  
900 N. Skyline Dr.  
Idaho Falls, ID 83402-6105  
By U.S. Mail



KATHLEEN MARION CARR